

RELEASED IN PART B6

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Schnitker, John P

From: Orlando, Elizabeth A
Sent: Thursday, September 09, 2010 11:17 AM
To: Schnitker, John P
Subject: FW: Inclusion of new information in FEIS/Comments in ROD
Attachments: Davis Mtns Assoc v FAA.doc; Pages from SFX77A.pdf; Pages from ROD_NY Airspace-2.pdf

FYI

From: Jim White [mailto:jim_p_white@transcanada.com]
Sent: Tuesday, September 07, 2010 5:03 PM
To: Benes, Keith J; Orlando, Elizabeth A; McManus, Matthew T; Michael Schmaltz
Cc: Kevin Freeman
Subject: Inclusion of new information in FEIS/Comments in ROD

The following information is provided in support of a process which includes new information in a Final EIS and allows for comment on the new information between the FEIS and the Record of Decision:

- First, this process is sanctioned in the CEQ NEPA regulations at 40 C.F.R. 1503.1(b): “An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under section 1506.10.”
- Second, there are numerous instances in which this process has been utilized. For example:
 - As shown in the attached DOT/FAA ROD for an air-space decision, the FAA addressed comments on an FEIS because of last-minute information added to the Final. The discussion begins on page 48 of the attached ROD.
 - As reflected in the attached pages from briefing in Village of Bensenville v. FAA (Pages from SFX77A), the Final EIS directly presented a matter not discussed in the DEIS — proposed compliance with RFRA and runway alignment to avoid taking a cemetery adjacent to O’Hare. Comments on the FEIS proposal were encouraged and issues raised were resolved in the ROD. Notwithstanding 20 years of litigation over O’Hare expansion there was no challenge to the process employed by FAA to get there.
 - In a number of additional NEPA processes, for one reason or another, the agency has allowed agency and public comment on an FEIS and responded to those comments in the ROD:
 - The FEIS for a brand-new commercial passenger service airport in Panama City, Florida.
 - The FEIS for a major runway relocation project at the Port Columbus Airport in Columbus, Ohio.
 - The FEIS for a new air traffic control procedure for commercial aircraft using the Ft. Lauderdale International Airport in Florida
 - The FEIS (on remand from the D.C. Circuit) for a new airport including commercial service for St. George, Utah.
 - The FEIS for the extension of Runway 17/35 at the Philadelphia International Airport
 - The FEIS for the construction of a new air carrier landing-only runway (Runway 14.32) at Boston Logan International.
- Third, an unpublished Fifth Circuit case that supports this process. In *Davis Mountains Trans-Pecos Heritage Association v. FAA*, 116 Fed. Appx. 3 (5th Cir. Oct. 12, 2004), the petitioners challenged an EIS performed by the FAA and Air Force as it failed to include a discussion of

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mitigation measures in the draft EIS, although they appeared in the final EIS. The court held that "even if the agency omits the mitigation discussion from the draft, nothing prevents the public from commenting on the mitigation measures once the agency issues the final EIS, and petitioners do not argue that they were prevented from commenting during the two months between the issuance of the final EIS and the Air Force's ROD. Given these considerations, we find it unnecessary in the present case to adopt a rigid rule that a draft EIS *must* contain a mitigation discussion, although we note that inclusion of such a discussion is ideal." 116 Fed. Appx. at 14-15.

Let me know if you would like additional information on this subject.

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